STATE OF MICHIGAN

IN THE SUPREME COURT

THE ESTATE OF MARGARETTE F. EBY,
Deceased, by its Personal Representative,
DAYLE TRENTADUE,

Plaintiff-Appellee,

-vs-

BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY, SHIRLEY GORDON, and LAURENCE W. GORTON,

Defendants-Appellants,

and

MFO MANAGEMENT COMPANY, JEFFREY GORTON, VICTOR NYBERG, TODD MICHAEL BAKOS, and CARL L. BEKOFSKE, as Personal Representative of the Estate of RUTH R. MOTT, deceased,

Defendants.

Supreme Court Nos. 128579

Court of Appeals No. 252207

Lower Court No. 02-074145-NZ

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

CERTIFICATE OF SERVICE

*** ORAL ARGUMENT REQUESTED ***

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Pages**

Statutes

Rules

Other Authorities

COUNTERSTATEMENT OF QUESTIONS INVOLVED

I. DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT THE DISCOVERY RULE APPLIED TO MS. TRENTADUE'S CAUSE OF ACTION AND, ON THAT BASIS, DETERMINE THAT THIS CASE WAS NOT BARRED BY THE STATUTE OF LIMITATIONS?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

II. DOES MICHIGAN'S ACCRUAL STATUTE, MCL 600.5827, APPLY TO THIS ACTION?

Plaintiff-Appellee says "No".

Defendant-Appellant says "Yes".

III. UNDER THIS COURT'S DECISIONS IN *BRYANT V OAKPOINTE VILLA NURSING CENTRE,* 471 MICH 411; 684 NW2D 864 (2004) AND *DEVILLERS V AUTO CLUB INS ASS'N*, 473 MICH 562; 702 NW2D 539 (2005), IS THIS AN APPROPRIATE CASE FOR THE EXERCISE OF A COURT'S EQUITABLE AUTHORITY AFFECTING A LIMITATIONS PERIOD?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

IV. WOULD ELIMINATION OF THE DISCOVERY RULE RENDER THE APPLICABLE STATUTES OF LIMITATIONS UNCONSTITUTIONAL?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

V. WOULD THE DEFENDANTS' INTERPRETATION OF THE APPLICABLE STATUTES OF LIMITATIONS VIOLATE THE PRINCIPLES OF *STARE DECISIS*?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

VI. WOULD THE DEFENDANTS' INTERPRETATION OF THE APPLICABLE STATUTES OF LIMITATIONS PRODUCE AN ABSURD RESULT?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

VII. DOES THE TEXT OF MCL 600.5827 SUPPORT A CONSTRUCTION CONSISTENT WITH THE DISCOVERY RULE?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

VIII. REGARDLESS OF THE COURT'S DISPOSITION WITH RESPECT TO THE DISCOVERY RULE, DOES MCL 600.5869 DICTATE THAT THE LAW IN EXISTENCE AT THE TIME OF THE ACCRUAL OF THIS CLAIM, INCLUDING THE DISCOVERY RULE, APPLIES TO THIS CAUSE OF ACTION?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

IX. SHOULD THE DISCOVERY RULE BE APPLIED TO THIS CAUSE OF ACTION INVOLVING THIRD PARTY CRIMINAL ACTIVITY?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

X. DID THE CIRCUIT COURT PROPERLY CONCLUDE THAT SUMMARY DISPOSITION WAS NOT APPROPRIATE ON DEFENDANT'S CLAIM THAT IT COULD NOT BE HELD VICARIOUSLY LIABLE FOR THE CONDUCT OF TWO OTHER DEFENDANTS, VICTOR NYBERG AND TODD MICHAEL BAKOS?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

COUNTERSTATEMENT OF FACTS

Contemporaneously with the filing of this brief, the plaintiff is also filing a response to the brief filed by the other party appealing from the Court of Appeals' decision, MFO Management Company. That brief contains a full counterstatement of the relevant facts. Rather than repeating these same facts, the plaintiff simply incorporates them into this brief.

SUMMARY OF ARGUMENT

In its July 19, 2006, order granting leave to appeal, this Court has asked the parties to brief these questions:

> [W]hether the Court of Appeals application of a common law discovery rule to determine when plaintiff's claims accrued is inconsistent with or contravenes MCL 600.5827, and whether previous decisions of this Court, which have recognized and applied such a rule when MCL 600.5827 would otherwise control, should be overruled.
>
> *Trentadue* v *Buckler Automatic Lawn Sprinkler Company*, 475 Mich 906; 717 NW2d 329 (2006).

In the first issue of this brief, plaintiff will demonstrate why the questions posed by the Court must be answered in the negative. This brief will first address why MCL 600.5827, the accrual statute cited in the Court's order granting leave is inapplicable to this case. The statute which, instead, must be applied in these circumstances is MCL 600.5805(10), the general statute of limitations governing this action.

Application of equity to save this otherwise time-barred action cannot be held inconsistent with MCL 600.5805(10). This Court has recently confirmed in two decisions, *Bryant* v *Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411; 684 NW2d 864 (2004) and *Devillers* v *Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 939 (2005), that there remains a role for common law principles of equity that alter the statutes of limitation. A determination that a common-law equitable rule could not be enforced if it conflicts with a statute of limitation would eliminate any recourse to these equitable principles. Since such a conclusion is directly contrary to this Court's decisions in both *Bryant* and *Devillers*, the notion that applying equity to change the limitations period in this case is inconsistent with the general statute of limitations, MCL 600.5805(10) must be rejected.

There are, moreover, other factors militating against the elimination of an equitable principle that would save this case, including the fact that elimination of this doctrine subjects the applicable limitations statutes to constitutional challenge, violates the principles of *stare decisis*, and would render an absurd result. Additionally, if this Court determines that MCL 600.5827 controls this case, it is possible to read a discovery rule into the text of that statute. For these reasons, this Court should affirm the Court of Appeals.

ARGUMENT

I. APPLICATION OF COMMON-LAW EQUITABLE PRINCIPLES IS NOT INCONSISTENT WITH THE STATUTES OF LIMITATIONS THAT APPLY TO THIS CASE.

The Court of Appeals ruled in its March 24, 2005 opinion that because the discovery rule applied to Ms. Trentadue's cause of action, it was not barred by the statute of limitations. In this Court's July 19, 2006, order granting leave to appeal, the Court has requested the parties to brief two questions: (1) whether the Court of Appeals' application of the discovery rule to this case contravened MCL 600.5827, and (2) whether the common law[1] discovery rule should be recognized at all. *Trentadue* v *Buckler Automatic Lawn Sprinkler Company*, 475 Mich 906; 717 NW2d 329 (2006).

As this brief explains, this case is controlled by MCL 600.5805(10), not MCL 600.5827. Under this Court's recent rulings, applying equity to alter the statute of limitations is appropriate under specific, discrete circumstances when the controlling statute does not expressly prohibit it. These equitable powers also allow courts to interpret Michigan's statutes of limitations in a way that does not violate litigants' due process rights, that comports with the principles of *stare decisis*, and that prevents absurd results.

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[1]The precise source of the discovery rule under Michigan law is open to some debate. There is language in this Court's decision in *Connelly* v *Paul Ruddy's Equipment Repair*, 388 Mich 146; 200 NW2d 70 (1970), which could support the view that the discovery rule is derived from that Court's interpretation of the accrual statute, MCL 600.5827. In *Connelly*, this Court interpreted §5827 as providing that a cause of action accrues, "when all of the elements of the cause of action have occurred and *can be alleged* in a proper complaint." 388 Mich at 72 (emphasis added). This language might suggest that it was based on the Court's interpretation of §5827, that a discovery rule was adopted. However, later decisions of this Court have expressly stated that the discovery rule in a common law doctrine. *See Stephens* v *C. J. Dixon*, 449 Mich 531, 535; 536 NW2d 755 (1995). This Court's order granting leave also refers to the discovery rule as a common law concept. Plaintiff will, therefore, treat it as such herein.

A. MCL 600.5827 Does Not Control This Case.

When this Court granted leave to appeal, it asked the parties to brief the question of whether the discovery rule conflicts with Michigan's accrual statute, MCL 600.5827. MCL 600.5827 provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 and 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

The defendants dutifully argue that this statute is an explicit legislative statement as to when a cause of action accrues, which a common-law principle like the discovery rule cannot contradict. But this argument glosses over an essential preliminary question - whether §5827 even controls Ms. Trentadue's cause of action. As explained below, it does not.

No doubt, *all* causes of action are governed by a statute of limitation. In Michigan, the statute that governs personal injury actions is MCL 600.5805, which contains 13 subparagraphs that describe the period that applies to the various personal injury claims available under the law. The specific subparagraph that applies to Ms. Trentadue's claim is MCL 600.5805(10), which states:

> A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

This subparagraph is notably different from the others in §5805. The other subparagraphs provide only a specific time period in which a case must be filed. For example,

§5805(2) specifies that after a claim first accrues, "[t]he period of limitations is 2 years for an action charging assault, battery or false imprisonment." Similarly, §5805(5) simply states that, "[t]he period of limitations is 2 years for an action charging malicious prosecution." Thus, most of the subsections in §5805 provide only two things - the type of personal injury claim and the number of years in which suit must be instituted. They do not provide an accrual provision. One must look to §5827 to determine when the limitations period begins to run.

But MCL 600.5805(10), the statute of limitations governing this case, is different. Apart from stating the time period for filing a case - three years - it also provides *when* that three year period is to be measured, "after the time of the death or injury." Accordingly, when §5805(10) controls, one need not look to §5827 for an accrual provision because §5805(10) provides one.

There are, therefore, two statutes that *potentially* determine whether Ms. Trentadue's claim is timely. The first is the accrual statute, §5827, which specifies that the statute of limitations begins to run on the date of the "wrong", rather than on the date of the injury. The second is the statute governing personal injury claims, §5805(10), which governs this case and contains its own accrual provision that mandates that the date of the injury triggers the start of the limitations period.

MCL 600.5827 and §5805(10) are inherently contradictory. Again, the former, §5827, provides that the limitations period *cannot* run from the date of the plaintiff's injury, and the latter, §5805(10), provides that the limitations period *must* run from the date of the plaintiff's injury.

Here, this conflict is resolved by the first five words of §5827, which require that the statute's accrual principle is applied, "[e]xcept as otherwise expressly provided." In this case, which is governed by §5805(10), the accrual of the limitations period is "otherwise expressly provided." Under §5805(10), it begins to run at "the time of the death or injury . . ."

This analysis disposes of both of the questions posed in this Court's July 19, 2006 Order. This Court first asked the parties to brief the question of whether applying the discovery rule in this case contravenes §5827. But by its own terms, §5827 does *not* govern this cause of action, §5805(10) governs it instead. Thus, the answer to this question must be, "no," for the simple reason that §5827 does not even apply here.

The second question raised by this Court's order is also directly tied to §5827. This Court requested briefing on the broader question of whether all decisions in which this Court applied the discovery rule "*when MCL 600.5827 would otherwise control,*" should be overruled. Since this case does not even present the question posed by the Court, *i.e.* one in which §5827 would "otherwise control," this case is a completely inappropriate vehicle for addressing the question which this Court has posed.[2]

B. This Court's Recent Jurisprudence Allows Courts To Apply Equity In Cases Governed By MCL 600.5805.

A pinpoint application of equity is appropriate when doing so will not negate a statute with express language prohibiting such tolling. In this case, controlled by §5805(10), the court can apply equity because of the particular, unique circumstances that the facts present. Additionally, contrary to the defendant's assertion, this Court has the Constitutional power to apply equity under such circumstances to ensure that Michigan's statutes of limitation comply with due process and to prevent absurd results.

In *Lewis* v *DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), this Court indicated that,

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[2] Because the questions posed by this Court's order are not implicated in this case governed by MCL 600.5805(10), the plaintiff requests, in the alternative, that this Court vacate its order granting leave to appeal.

"limitation statutes are not entirely inflexible, allowing judicial tolling under certain compelling circumstances." *Id.* at 102. As will be addressed, *infra*, this Court has since reversed the precise holding reached in *Lewis*. But, two decisions written by this Court in the last two years have reinforced *Lewis*'s observation that there are certain "compelling circumstances" in which judicial modification of a limitations period is appropriate.

The first of these two cases is *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411; 684 NW2d 864 (2004). In *Bryant,* this Court addressed whether plaintiff's cause of action sounded in medical malpractice or ordinary negligence. The answer to this question was significant because it dictated which statute of limitations which would apply. If the action was medical malpractice, it was time-barred under the two-year statute of limitations. If it was ordinary negligence, it was timely filed under the three-year statute of limitations. This Court concluded that *some* aspects of the plaintiff's claims were medical malpractice, while others were ordinary negligence. 471 Mich at 425-432.

This Court refused to rigidly apply the two-year limitations period to those claims that it concluded were medical malpractice and applied equity to alter the limitation period instead. In its reasoning, this Court stated that:

> The period of limitations for a medical malpractice action is ordinarily two years. MCL 600.5805(6). According to MCL 600.5852, plaintiff had two years from the date she was issued letters of authority as personal representative of Hunt's estate to file a medical malpractice complaint. Because the letters of authority were issued to plaintiff on January 20, 1998, the medical malpractice action had to be filed by January 20, 2000. Thus, under ordinary circumstances, plaintiff's February 7, 2001, medical malpractice complaint (her third complaint in total) would be time-barred.
>
> *The equities of this case, however, compel a different result.* The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence *is one that has troubled the bench and bar in* Michigan, even in the wake of our

> opinion in *Dorris*. *Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights*. Accordingly, for this case and others now pending that involve similar procedural circumstances, we conclude that plaintiff's medical malpractice claims may proceed to trial along with plaintiff's ordinary negligence claim. MCR 7.316(A)(7).
>
> 471 Mich at 432 (emphasis added).

In other words, despite a statute of limitations, MCL 600.5805(6), which subjected plaintiff's malpractice claims to dismissal as untimely, the Court nevertheless determined that this result was inequitable because the plaintiff's failure to comply with the statute of limitations was not the result of "a negligent failure to preserve her rights," but was, instead, the product of the considerable confusion in Michigan law distinguishing between a malpractice claim and an ordinary negligence claim. As *Bryant* demonstrates, even in a case that is barred by a time period in MCL 600.5805, there is still a place for judicially imposed changes to a limitations period.

This concept was affirmed in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005). *Devillers* involved the one-year back rule in Michigan's No-Fault Act, MCL 500.3145(1), which states that a no-fault claimant, "may not recover benefits for any portion of the loss incurred more than one year before the date on which the action was commenced."

The Court had interpreted this provision 19 years before, in *Lewis, supra*. There, this Court adopted equity and suggested that it be applied to all no-fault claims governed by §3145. *Lewis, supra*. But the *Devillers* Court concluded that *Lewis* was wrongly decided.

As the majority explained, §3145(1) "clearly and unambiguously states" that a no-fault claimant could not recover benefits for any portion of the loss "incurred more that one year before the date on which the action was commenced." 473 Mich at 564. From this basic premise,

the majority overruled *Lewis* because the Court's judicial change to the clear, unambiguous one year back rule of §3145(1), had improperly encroached on "the Legislature's prerogative to set policy," and violated "our long-established commitment to the application of statutes according to their plain and unambiguous terms." 473 Mich at 581.

In a dissenting opinion in *Devillers,* Justice Michael F. Cavanaugh challenged the majority's rejection of the *Lewis* application of equity, arguing that the Court had applied equity only one year before in *Bryant*. In response, the *Devillers* majority reaffirmed that Michigan courts retain the equitable power to alter a limitations period or to estop a limitations defense:

> *Although courts undoubtedly possess equitable power, such power has traditionally been reserved for "unusual circumstances" such as fraud or mutual mistake.* A court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking, as Justice Cavanaugh implies.
>
> 473 Mich at 590 (emphasis added).

The majority then distinguished *Bryant* from *Lewis* and explained why applying equity in the former was appropriate, when using it in the latter was not:

> In *Bryant*, our grant of equitable relief was a *pinpoint application* of equity based on the *particular circumstances surrounding the plaintiff's claim*; namely, the preexisting jumble of convoluted case law through which the plaintiff was forced to navigate. Accordingly, our limited application of equity in *Bryant* was entirely consistent with the *"unusual circumstances" standard* for equitable relief discussed above. In *Lewis*, however, the Court chose to adopt an a priori rule of equity without regard to the particular circumstances of litigants in a given case. In granting blanket equity to an entire *class* of cases, therefore, the *Lewis* Court essentially rewrote §3145(1). Such a categorical redrafting of a statute in the name of equity violates fundamental principles of equitable relief and is a gross departure from the proper exercise of the "judicial power." Const 1963, art 3, §2 and art 6, §1. Accordingly, Justice Cavanaugh's unmitigated praise for the *Lewis* Court's holding is, in our view, quite misplaced.
>
> Moreover, we note that, in *Bryant*, there was no controlling statute negating the application of equity. Instead, the disputed issue in *Bryant* - whether a claim sounds

> in medical malpractice or ordinary negligence - was controlled by this Court's case law. On the other hand, in the present case, there is a statute that controls the recovery of PIP benefits: §3145(1). Section 3145(1) specifically states that a claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced," and this Court lacks the authority to say otherwise.
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> *Id.* at 590, n. 65.

Devillers is important to this case for two reasons. First, it confirms that judges still play a role in applying equity to impact limitations periods. Second, the *Devillers* Court articulated a test, which provides courts with guidance as to the types of cases to which equity applies. To be clear, the *Devillers* test allows for a court to apply equity to alter a limitations period when a case meets three elements: (1) the case involves a pinpoint (case-by-case) application of equitable tolling, rather than a blanket rule that applies to all circumstances; (2) the particular circumstances of the case are unique and compelling; and (3) the case is governed by a provision of §5805 or some other statute that does not contain express language that prohibits using equitable tolling to modify the limitations period.

Both of these cases, *Bryant* and *Devillers*, recognize that courts in this state have some degree of equitable authority which can be applied to limitations periods in "exceptional circumstances." 473 Mich at 590; 471 Mich at 432. This Court can apply its equitable powers to affirm the trial court and Court of Appeals in this case because the *Devillers* three-part test has been satisfied.

First, *Devillers* calls for the pinpoint application of equity. To explain this requirement, the *Devillers* Court contrasted *Bryant* with *Lewis*. The Court explained that in *Bryant* there were unique facts that gave rise to the application of equity, namely the "jumble of convoluted

case law through which the plaintiff was forced to navigate" that led the plaintiff to improperly frame the claim as negligence, rather than malpractice. *Id. Lewis*, on the other hand, established an across-the-board tolling rule applicable to every case, "without regard to the particular circumstances of litigants in a given case." *Id.* In other words, where the court applied equitable principals irrespective of the particular circumstances and facts of the case, the Court had overreached its equitable powers and usurped the role of the Legislature.

This case is distinguishable from *Lewis* because the plaintiff here is not requesting an across the board application of an equitable rule, in this case the discovery rule. Rather, the plaintiff is requesting that this Court examine the particular circumstances and facts of this case and apply equity, as permitted by *Devillers.* While the result would be similar in this case to the application of the discovery rule, the application would not be an across the board tolling provision to be applied in each and every case. Because application in this case would be based on this case's particular facts, element one, a pinpoint application, is satisfied.

Second, the particular unique facts of this case are those that warrant application of equitable principals. In fact, they are even more compelling than those in *Bryant*. In *Bryant*, the Court explained that the unique facts giving rise to the application of equity was the "jumble of convoluted case law through which plaintiff was forced to navigate." In this case, the law was not convoluted at all, it was well settled. Plaintiff relied upon a long history of well-developed case law in which the courts have applied either equitable principals or the discovery rule to save otherwise time-barred claims.

Moreover, one can hardly find a more unique set of facts or a plaintiff more deserving of the application of equity than that of Ms. Trentadue. Having waited more than 16 years to hear

and see the truth surrounding her mother's death, having learned that others contributed to her death, and having uncovered that the truths of her mother's death were concealed by erroneous police theories, plaintiff immediately acted upon her rights when she learned these truths. This, as in *Bryant*, was not the case of a plaintiff who "negligently failed to preserve her rights."

This case is not a simple "discovery rule" case. Indeed, this is not a case were the plaintiff simply did not know the identity of a killer. *Smith* v *Randolph*, 2005 Mich App Lexis 825 (2005). This is not a case were plaintiff simply did not know the extent of injuries. *Stephens* v *Dixon*, 449 Mich 531; 536 NW2d 755 (1995). This is also not a case where plaintiff knew exactly how she had been wronged, but did not know the legal theory by which to pursue her claim. *Mascarenas* v *Union Carbide Corp*, 196 Mich App 240; 492 NW2d 512 (1992). These are common-law discovery rule principals. Rather, this is a case where the plaintiff knew nothing other than her damages - that her mother was dead. (And, in fact, Ms. Trentadue did not even know the extent of the damage until 2002; namely, that the nature of the death included an attack by a stranger lying in wait).

Applying the second factor of the *Devillers* test to this case, that the "particular circumstances surrounding the plaintiff's claim" compel the expansion of the limitation period, the decisions of the lower courts was proper, albeit under a discovery rule framework. The lower courts might have just as easily applied the *Devillers* rule to find that Plaintiff's claim allowed for a pinpoint application of the Court's equitable power to a particular plaintiff in the most extreme circumstances.

Indeed, the lower courts determined that the circumstances of Mrs. Eby's murder were so extreme and the likelihood that her children would be able to discover the true circumstances

surrounding her murder so remote, that the application of equity (in the form of the discovery rule) allowed for the finding that the claim had not accrued until police, using 21st century technology, were able to crack the case.

A correct understanding of the facts of this case is critical to the proper application of the *Devillers* rule. Flint Police are called to a most gruesome murder scene and leap to the conclusion that Mrs. Eby died at the hands of an acquaintance premised upon the determination that there was no "forced entry" into the gatehouse. That erroneous conclusion drives every aspect of the follow up investigation and prevents the consideration of any other possible theory. Because the theory was that only someone who Mrs. Eby knew could be the killer, Jeffrey Gorton is never questioned nor is his relationship to Defendant Buckler and their relationship to the Mott defendants ever considered. Unless one is to claim that it is incumbent upon Mrs. Eby's heirs to completely disregard the police investigation, develop a case upon entirely different theories and conduct an investigation in order to solve a crime that Flint Police could not, then it would seem that the plaintiff was prevented from discovering her claim through no fault of her own. Far from sitting on their rights, Ms. Trentadue's rights were controlled by others.

Finally, the third element of the *Devillers* test is satisfied because the application of equity will not negate the express language of a statute. Section 5805, and even 5827 for that matter, do not contain explicit language prohibiting a court from using equitable principals to modify the statute of limitations.

According to *Devillers*, a statute is negated when tolling will present a direct conflict with a clear limitation period presented in the statute. For example, when explaining *Lewis,* the

Devillers Court stated that applying equity was inappropriate because that tolling was in *direct* conflict with the clear time limitation imposed in §3145(1). Specifically, §3145(1) states that actions for recovering PIP benefits "*may not be* commended later" than the time specified in the statute. (Emphasis added). The major flaw in *Lewis* was that the Court applied equity in the face of an explicit Legislative prohibition of such tolling. That is, applying equity in *Lewis* negated the unambiguous temporal limitation on the scope of damages that the Legislature included in §3145(1).

Similarly, one could not apply equitable principals to MCL 600.5838 and 600.5838a because doing so would also negate explicit language in those statutes that prohibit such equitable extensions. For example, MCL 600.5838, in pertinent part, states that:

> (1) Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is . . . a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudo professional capacity as to the matters out of which the claim for malpractice arose, *regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.*
>
> (Emphasis added).

MCL 600.5838a has similar language:

> (1) For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional . . . accrues at the time of the act or omission that is the basis for the claim of medical malpractice, *regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.*
>
> (Emphasis added).

In these two statutes, the Legislature specifically indicated when a cause of action accrues and provided that this accrual occurs "regardless of when the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838(2); MCL 600.5838a(2). In light of this express language, applying equity is inappropriate in those professional negligence cases that these two

statutes govern because doing so would *negate* the Legislature's express disavowal of a discovery rule. But, quite obviously, such express language prohibiting judicial tolling is unmistakably absent from §5805(10).

The significant difference between the statute in *Lewis*, §5838, and §5838a, and the statutes involved in this case, is that the former statutes contain explicit language denying the use of equity. This case, similar to *Bryant*, which relies on §5805(10), contains no such prohibiting language. Ms. Trentadue's cause of action does not satisfy the limitations period provided in the applicable subsection of the statutes of limitations, MCL 600.5805(10). But, just as in *Bryant*, where there was "no controlling statute negating the application of equity" to be found in §5805(6), there can be no "controlling statute negating the application of equity" in §5805(10) here. Not only is this the law as developed by this Court in *Devillers*, it *has* to be the law in light of one other clear conclusion to be drawn from this Court's decisions in *Bryant* and *Devillers*.

Courts have some degree of equitable authority which can be applied to limitations periods in "exceptional circumstances." 473 Mich at 590; 471 Mich at 432. Obviously, any exercise of such equitable authority will have the effect of "changing" the limitations period applicable in a particular case. If such judicially imposed "changes" to the limitations period could be struck down as inconsistent with the statutes of limitations such as §5805, the end result would be that *no* equitable authority could ever be exercised to alter a statute of limitations.

But every case is governed by *some* statute of limitations. And, every equitable principle imposed by a court which tolls a limitations period or estops a limitations defense is designed in some way to alter that applicable limitations period. Thus, if an equitable concept applied by a court is ruled inappropriate solely because it "conflicts" with §5805 or any other statute

of limitations, the result would be that there would *never* be authority to establish a judge made rule which tolls the statute of limitations, a point explicitly rejected by this Court in both *Bryant* and *Devillers*.

Furthermore, Defendants claim that there is no space in our constitutional framework for applying equity to alter limitations periods. As previously explained, this argument is incompatible with this Court's recent rulings in *Bryant* and *Devillers*. But, more importantly, this argument is also incompatible with recent observations made by Justice Antonin Scalia in *Young* v *United States*, 535 US 43 (2002), a case in which the Supreme Court of the United States considered applying equity to change a statute of limitations. In *Young*, Justice Scalia wrote:

> It is hornbook law that limitations periods are 'customarily subject to equitable tolling,' unless tolling would be 'inconsistent with the text of the relevant statute.' Congress must be presumed to draft limitations periods in light of this background principle.

Id. at 49-50 (citations omitted).

To be sure, another principle of judicially altering a limitations period, the common-law discovery rule, has existed for many years. *See e.g. Johnson* v *Caldwell*, 371 Mich 368; 123 NW2d 785 (1963); *Williams* v *Polgar*, 391 Mich 6; 215 NW2d 149 (1974). Like the federal law discussed in *Young, supra,* Michigan law recognizes that "the Legislature is deemed to act with an understanding of common law in existence before the legislation was enacted." *Nation* v *WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997).

Thus, when the Michigan Legislature passed the statute of limitations that applies to this case, §5805(10), it was presumptively aware of the common-law discovery rule and the effect that it has on limitations periods. But even in the face of this knowledge, the Legislature drafted

§5805 without express language that prohibits the application of this long-recognized common-law doctrine.[3]

Furthermore, a court's application of the discovery rule to change a limitations period or to estop a limitations defense is constitutionally legitimate. The discovery rule is a matter of ripeness - a determination of when the plaintiff's action matures sufficiently to sustain a lawsuit. The defendants' contention that the determination of when a case matures is exclusively within the Legislature's control must be rejected because this Court's recent decisions cast serious doubt on the basic premise behind these arguments.

Under Const, art 3, §2, governmental authority in Michigan is constitutionally divided between the three branches. The Constitution does not specifically define the scope of the "judicial power." This Court, however, recently described that constitutional grant of judicial power as follows:

> The 'judicial power' has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; *the plaintiff who has suffered real harm*; the existence of genuinely adverse parties; *the sufficient ripeness or maturity of a case*; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making.
>
> *National Wildlife Federation* v *Cleveland Cliffs Iron Co,* 471 Mich 608, 614; 684 NW2d 6 (2002) (emphasis added).

The discovery rule touches upon subjects which are squarely within the constitutional realm of the judiciary as described in *National Wildlife*. *See also Michigan Chiropractic Counsel*

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[3]Again, the Legislature has twice recognized to the common-law discovery rule by passing statutes which expressly abrogate it. *See* MCL 600.5838 and MCL 600.5838a.

v *Insurance Commissioner*, 475 Mich 363, 370, 378-382; 716 NW2d 561 (2006) (opinion by J. Young). As noted in *National Wildlife* and *Michigan Chiropractic*, the question of when a cause of action matures - the fundamental issue that the discovery rule addresses - is one that is within the constitutional power of the judiciary to determine.

C. Elimination Of These Equitable Principles Would Render Michigan's Statutes Of Limitations Unconstitutional.

Applying equity to this case is not only constitutional based on this Court's interpretation of its own judicial power, but it is necessary to avoid rendering Michigan's statutes of limitations unconstitutional. For over 140 years, Michigan courts have recognized that, while the Legislature has the unquestioned authority to enact statute of limitations, there are due process limitations on the enactment of such statutes. Justice Thomas M. Cooley addressed these concerns in *Price* v *Hopkin*, 13 Mich 318 (1865):

> The general power of the legislature to pass statutes of limitation is not doubted. The time that these statutes shall allow for bringing suits is to be fixed by the legislative judgment, and where the legislature has fairly exercised its discretion, no court is at liberty to review its action, and to annul the law, because in their opinion the legislative power has been unwisely exercised. *But the legislative authority is not so entirely unlimited that, under the name of a statute limiting the time within which a party shall resort to his legal remedy, all remedy whatsoever may be taken away.*
>
> *Id.*, 324 (emphasis added).

Since *Price,* Michigan courts have repeatedly held that a limitations period that fails to provide plaintiffs a reasonable time to file suit is subject to a due process challenge. *Krone* v *Krone*, 37 Mich 308 (1877); *Dyke* v *Richard*, 390 Mich 739, 746; 213 NW2d 185 (1973); *Eberhard* v *Harper-Grace Hospitals*, 179 Mich App 24, 34; 445 NW2d 469 (1989); *cf Terry* v *Anderson*, 95 US 628, 632-633 (1877) ("statutes of limitations affecting existing rights are not unconstitutional,

if a reasonable time is given for the commencement of an action before the bar takes effect."); *Canadian Northern Railway Co* v *Eggen*, 252 US 553, 562 (1920) ("a man cannot be said to be denied, in a constitutional . . . sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.")

This Court has further held that a limitations provision that fails to give plaintiffs a reasonable time to file suit unconstitutionally prevents access to the courts. *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978) ("statutes of limitations are to be upheld by courts unless it can be demonstrated that they are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right.")

It is well established under Michigan law that the Legislature can, if it chooses, completely eliminate common-law causes of action. *Bean* v *McFarland*, 280 Mich 19, 21; 273 NW332 (1937); Const 1963, art 3, §7. The Michigan Legislature may also constitutionally extinguish a particular cause of action after a designated period of time. *See e.g. O'Brien* v *Hazlett & Erdal*, 410 Mich 1; 299 NW2d 336 (1980).[4] But a statute of limitations is fundamentally different than these legislative acts. A statute of limitations serves to "penalize plaintiffs who have not been

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[4]The Court's decision in *O'Brien* deserves particular attention here. *O'Brien* considered the statute of repose for actions filed against architects and engineers, MCL 600.5839. That statute specifies that any cause of action against such a professional based on a defective building is prohibited six years after the building's completion. The Court in *O'Brien* rejected a due process challenge to the six year statute of repose because the Legislature had the right to make a decision to extinguish any right that the plaintiff had to sue after the six year time period expired. The Legislature could, therefore, constitutionally "prevent what might otherwise be a cause of action from ever arising." 410 Mich at 15, n. 19. Yet, even in approving the statute of repose, the *O'Brien* Court indicated in a footnote that, where a cause of action arose shortly *before* the six year period expired and the plaintiff did not have a reasonable period of time to institute suit before the expiration of that period, the statute would be subject to a due process challenge. *Id.*, n. 18.

industrious in pursuing their claims." *Lothian* v *City of Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982); *see also Lemmerman v Fealk*, 449 Mich 56, 65; 534 NW2d 695 (1995) (statutes of limitations "encourage plaintiff to pursue claims diligently."). In other words, statutes of limitations are designed to bar a plaintiff's claim where that plaintiff failed to pursue it with industry and diligence.

This necessarily means that under such cases as *Price, Krone, Dyke* and *Forest*, penalizing a plaintiff for lack of industry or diligence is inconsistent with the basic notions of due process where the applicable statute of limitations does not allow a reasonable time for the plaintiff to file suit. If the defendants correctly interpret the status of Michigan's statutes of limitations and common-law rules like the discovery rule, this case presents a clear example of a limitations period that failed to give Ms. Trentadue a reasonable opportunity to file her claim. Under the defendants' analysis, Ms. Trentadue neither knew of nor could have known of her claim against the defendants until well after the statute of limitations expired. To apply the limitations period as defendants conceive it to this case would penalize Ms. Trentadue for a lack of industry and diligence, despite the fact that she had no knowledge of such a claim.

This Court has applied Justice Cooley's comments in *Price* regarding due process considerations to a case involving a plaintiff who, like Ms. Trentadue, could not have discovered her claim until after the limitations period had expired. In *Dyke v Richard, supra*, this Court ruled:

> Since "[i]t is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought . . .", *Price, supra*, a statute which extinguishes the right to bring suit cannot be enforced as a law of limitation. As to a person who does not know, or in the exercise of reasonable diligence could not ascertain within the two year period that he has a cause of action, this statute has the effect of abolishing his right to bring suit.

> Such a statute, if sustainable at all could be enforced only as one intended to abolish a common law cause of action. But this statute does not purport to do this, is not asserted to do so, and we cannot ascribe any legislative intention to accomplish that end. *We read it as a statute of limitation which applies in every case except where the plaintiff does not know of his cause of action.*
>
> 390 Mich at 746-747.

Thus, in *Dyke*, this Court applied the discovery rule to avoid a constitutional problem in the applicable statute of limitations. The Court of Appeals did precisely the same in *Eberhard*, 179 Mich App at 34.

The limitations law which the defendants ask this Court to adopt raises clear constitutional concerns. The defendants' arguments regarding the applicable limitations period and the discovery rule reaches a result which, if accepted, would violate Ms. Trentadue's basic due process rights. Only by applying either the rule of equity as set forth in *Devillers* or the common-law discovery rule, will this Court avoid such a violation.

D. <u>This Court Should Adhere To The Discovery Rule Based On Principles Of *Stare Decisis*.</u>

In granting leave to appeal the Court has requested briefing on the question of whether previous decisions of this Court recognizing a discovery rule "should be overruled." *Trentadue*, 475 Mich at 906. Quite apart from the questions addressed, *supra*, there is one additional issue which this Court must consider before overruling all prior precedents on this subject: "Whether the doctrine of *stare decisis* nevertheless obliges us to adhere to [these] holding[s]." *Devillers v Auto Club Insurance Association*, 472 Mich 562, 584; 702 NW2d 539 (2005); *Robinson* v *City of Detroit*, 462 Mich 439, 465; 613 NW2d 307 (2002) ("the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate.").

This Court does not lightly overrule existing precedent. *Pohutski* v *City of Allen Park*, 465 Mich 675, 693; 641 NW2d 219 (2002); *Nawrocki* v *Macomb County Road Commission*, 463 Mich 143, 180; 615 NW2d 702 (2000). *Stare decisis* is generally "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance of judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Robinson*, 462 Mich at 463; *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 284, n. 10; 696 NW2d 646 (2005).

The Court has in recent years, however, refused to apply principles of *stare decisis* and overruled existing precedent where, "we are certain that it was wrongly decided and 'less injury will result from overruling it than from following it.'" *People* v *Starks*, 473Mich 227, 236, n. 8; 701 NW2d 136 (2005); *People* v *Davis*, 472 Mich 158, 168, n. 19; 695 NW2d 45 (2005); *McEvoy* v *City of Sault Ste Marie*, 136 Mich 172, 178; 98 NW 1006 (1904).[5] Thus, before overruling past precedent, this Court must determine, "whether overruling such a decision would work an undue hardship because of reliance interests or expectations that have arisen." *Robertson* v *DaimlerChrysler Corp*, 465 Mich 732, 757; 641 NW2d 567 (2002). In assessing this reliance interest, "the Court must ask whether the previous decision has become so imbedded, so accepted, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466.

The discovery rule has, in fact, become so embedded in the fabric of Michigan limitations law that the precedents of this Court embracing this doctrine should not be disturbed.

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[5]For all of the reasons discussed previously in this brief, plaintiff would suggest that this Court cannot be *certain* that each of the prior decisions of this Court applying the discovery rule was wrongly decided.

The discovery rule has been a part of Michigan limitations law for many years. While the applicability of the discovery rule to particular fact situations and particular theories has been debated, there has been general acceptance of the equitable concept behind that rule.[6]

Most importantly for present purposes, the operation of the discovery rule has been recognized by the Michigan Legislature. As noted previously, since the decisions of this Court adopting the discovery rule, the Michigan Legislature has twice passed statutes which expressly limit the operation of that discovery rule. In both MCL 600.5838 and MCL 600.5838a, the provisions applicable to professional negligence, the Michigan Legislature has described how the limitations period operates in such cases and added language that the period of limitations described therein applies, "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim."

If this Court considers overruling all of its existing precedents recognizing a discovery rule, the language contained in MCL 600.5838 and MCL 600.5838a is of considerable importance for two reasons.[7] First, the language contained in §5838 and §5838a demonstrates that the Michigan

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[6]This general acceptance is reflected in the fact that the defendants in this case did not apply for leave in this Court on the ground that the discovery rule should be abolished. It was not until this Court issued its order granting leave to appeal that the continuing validity of the discovery rule was questioned.

[7]Plaintiff would also suggest that MCL 600.5838 and MCL 600.5838a are of importance with respect to another issue being raised herein, the due process question addressed in Issue I(D), *supra*. What is of significance in §5838 and §5838a with respect to the constitutional argument plaintiff raises herein is that, after the Legislature expressly eliminated the operation of the discovery rule in both of these statutes, it proceeded to provide a *statutory* discovery period. Both statutes allow a timely action to be filed within six months "after the plaintiff discovers or should have discovered the existence of the claim . . ." *See* MCL 600.5838(2); MCL 600.5838a(2). Thus, even when the Michigan Legislature took affirmative steps to eliminate resort to a *common law* discovery rule, it felt compelled to provide a *statutory* discovery period. As discussed in the constitutional argument which plaintiff raises herein, the statutory discovery rule contained in §5838 and §5838a is necessary to comply with fundamental notions of due process.

Legislature is certainly aware of what it needs to do if it elects *not* to have the discovery rule apply to particular types of cases. MCL 600.5838 and MCL 600.5838a are, therefore, important in this context because they demonstrate that there are steps available to the Michigan Legislature to eliminate the discovery rule in some (or all) cases, but the Legislature has not taken such action with respect to the cause of action alleged by Ms. Trendadue here.

Second, and more fundamentally, the language which has been incorporated into §5838 and §5838a *represents a legislative recognition of the discovery rule*. The Michigan Legislature, by enacting statutes which specifically limit the applicability of the discovery rule in one type of case - professional negligence - has acknowledge the existence and applicability of the discovery rule. As a result, in a legal or medical malpractice case, a plaintiff may no longer claim the benefit of the discovery rule. But, the fact that the Michigan Legislature has carved out a particular area where recourse to a common law discovery rule is prohibited fully supports the view that the discovery rule is to be applied outside the areas addressed in §5838 and §5838a.

Thus, in considering whether this Court should overrule all of the existing precedents on the subject of the discovery rule, this Court must recognize that this rule has been in effect for many years and, with the exception of the professional negligence theories addressed in §5838 and §5838a, the Michigan Legislature has never taken steps to eliminate reliance on this common law doctrine.

In raising the foregoing point, plaintiff acknowledges that a majority of the members of this Court rejects the doctrine of legislative acquiescence in interpreting Michigan statutes. Legislative acquiescence is the notion that "this Court should retain the previous interpretation of a statute that is clearly wrong simply because the Legislature has not amended the statute to correct

our error." *Paige* v *City of Sterling Heights*, 476 Mich 495, 516; 720 NW2d 219 (2006); *Neal* v *Wilkes*, 470 Mich 661, 668, n. 11; 685 NW2d 648 (2004). It is, however, important to note the basic reasoning behind the aversion to the concept of legislative acquiescence expressed by several members of this Court. As explained in *Donajkowski* v *Alpena Power Co*, 460 Mich 243; 596 NW2d 574 (1999), the doctrine of legislative acquiescence is viewed with disfavor because, "sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence." *Id.* at 261 (emphasis in original); *Paige*, 476 Mich at 516; *Neal*, 470 Mich at 668, n. 11.

In this case, plaintiff does not ask this Court to take direction from the Legislature's *silence* in the face of judicial decisions adopting the discovery rule. Instead, plaintiff suggests that this Court, in deciding whether the discovery rule should be retained, must examine the *words* used by the Michigan Legislature in §5838 and §5838a. Plaintiff would further suggest that, on the basis of these *words*, the Court should come to the conclusion that the Michigan Legislature has not merely embraced the discovery rule with its silence, it has acknowledged both the existence and continuing vitality of this concept by statutorily carving out specified exceptions to the discovery rule's effect.

Based on the foregoing, even if this Court were to hold that the precedents of this Court pertaining to the discovery rule were incorrectly decided, this Court should nonetheless conclude that these prior decisions should not be overruled on the basis of *stare decisis*.

E. Construing The Governing Michigan Statutes As Defendants Propose Would Render An Absurd Result.

This Court has held that "[s]tatutes should be construed so as to prevent absurd

results, injustice or prejudice to the public interest." *McAuley* v *General Motors*, 457 Mich 513, 518; 578 NW2d 282 (1998); *Rafferty* v *Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999). Defendants' interpretation of Michigan's limitation1 statutes, coupled with the elimination of the discovery rule, would lead to absurd results.

If the defendants' position were adopted as Michigan law, it would mean that there would be a select group of cases in which the plaintiff loses the right to pursue a cause of action before the plaintiff has or could have had knowledge of that cause of action. Moreover, the defendants' position, if adopted, holds out the prospect that there will be cases under Michigan law in which a plaintiff will *never* be able to file suit. Such a result necessarily follows from this Court's decision in *Henry v The Dow Chemical Company*, 473 Mich 63; 701 NW2d 684 (2005). In *Henry*, this Court ruled that relief under a tort theory will be allowed only when the plaintiff has suffered a present injury. 473 Mich at 74. There will, therefore, be cases in which the plaintiff's injury is not manifest for a period of time and, for that reason, no case could be pursued under *Henry*. *See Moll* v *Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1995) . But, if the plaintiff's injury manifests itself at a later date which is beyond the established limitations period, it would mean that under the analysis of limitations law proposed by the defendants, the plaintiff would have lost the ability to bring a timely suit *before* that plaintiff had the right to even bring such a suit.

The absurdity of a system under which a party loses his/her cause of action as untimely before suit could even be instituted was highlighted by Judge Jerome Frank in his frequently cited dissent in *Dincher v Marlin Firearms Co*, 198 F2d 821, 823 (2nd Cir 1952):

> Except in topsy-turvy land you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar

> reasons, it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i.e.*, before a judicial remedy is available to the plaintiff. For a limitations statute, by its inherent nature, bars a cause of action solely because suit was not brought to assert it during a period when the suit, if begun in that period, could have been successfully maintained; the plaintiff, in such a case, loses for the sole reason that he delayed - beyond the time fixed by the statute-commencing his suit which, but for the delay, he would have won.

In its application of the discovery rule, this Court has been motivated by similar concerns. This Court has indicated that the elimination of the discovery rule would result in cases in which the defendants' statute of limitations argument seeks, "to declare the bread stale before it is baked." *Moll,* 444 Mich at 13; *Chase* v *Sabin*, 445 Mich 190, 196-197; 516 NW2d 60 (1994). This is an absurd result. Under the arguments proposed by the defendants, the statute of limitations would reach such a result which is, "utterly or obviously senseless, illogical, or untrue; contrary to all reason or common sense; laughably false or foolish." *Cameron* v *Auto Club Ins Ass'n*, 476 Mich 55, 84; 718 NW2d 784 (2006) (J. Markman, concurring).

For this reason as well, the Court should reject the defendants proposed interpretation of the applicable limitations statutes.

II. EVEN IF §5827 APPLIES TO THIS CASE, IT IS POSSIBLE TO READ A DISCOVERY RULE INTO THE TEXT OF THAT STATUTE.

For reasons discussed previously, §5827 does not govern this case. But, even if this Court determines that it does, it is possible to support the application of a discovery rule through the text of that statute. The Court's primary goal in interpreting statutes is to discern and give effect to the Legislature's intent. *Cameron v Auto Club Insurance Ass'n,* 476 Mich 55, 60; 718 NW2d 784 (2006); *Echelon Homes, LLC* v *Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). This Court must give effect to every word, phrase and clause in a statute and must avoid an interpretation

that would render any part of the statute surplusage or nugatory. *Koontz* v *Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Moroever, "courts should avoid unnecessarily reading any portion of a statute out of existence because of rigid adherence to the doctrines of literalism and plain meaning." *Michalsku* v *Bar-Levav*, 463 Mich 723, 738-739; 625 NW2d 754 (2001). Further, undefined statutory terms are given their plain and ordinary meanings, which may be ascertained by looking at dictionary definitions. *Eschelon Homes*, 472 Mich at 196.

Additionally, where word is defined in more than one way, this Court has used the doctrine of *noscitur a sociis* to determine the meaning of a word, based on the context in which it appears. *Koontz*, 466 Mich at 317-318; *Griffith* v *State Farm Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005). This Court has also used the doctrine in circumstances where the words in a statute have particular meaning in the law. *Tyler* v *Livonia Public Schools*, 459 Mich 382, 390-391; 590 NW2d 560 (1999). MCL 600.5827 tells us only when a claim accrues, "at the time that the wrong upon which the claim is based is done." However, before focusing on when the "wrong" is done, the threshold question under §5827 is whether a "claim" even exists.

As in *Tyler*, the context in which the word "claim" appears reveals that "claim" has particular meaning in the law. Certainly, "claim" could mean allegation, as in "she made the claim (allegation) that his action was negligence." It could also mean in certain circumstances "statement", as in "she made the claim (statement) that she did not like the rain . . ." But, mere allegations or statements do not accrue. Only causes of action accrue. Thus, before a claim can accrue under §5827, it must constitute an enforceable cause of action, with all the elements present at the time the wrong was

done, unless the statutory language sufficiently excludes an element.[8]

This conclusion is supported by the many dictionary definitions upon which the Court has relied over the years to determine the meaning of the word "claim". For instance, this Court in an early case held out the word "claim" as used in a state constitutional provision, "clearly means claims resting upon some legal basis." MCL 600.5827 explains when a *claim* accrues, at that the wrong; it does not indicate what constitutes a *claim* for purposes of that statute.

This Court has for many years relied on a dictionary definition of the word "claim" to hold that it amounts to an *enforceable* cause of action. As early as 1899, the Court held that "claims" as used in a state constitutional provision, "clearly means claims resting upon some legal basis." *Allen v Board of State Auditors*, 122 Mich 324, 328; 81 NW 113 (1899). In doing so, the Court relied on a dictionary which defined "claim" as "a demand of right or alleged right; a calling on another for something due or asserted to be do; as, a claim of wages for services." *See also Central Wholesale Co* v *Chesapeak & Ohio Railway Co*, 366 Mich 138, 149; 114 NW2d 221 (1962). This Court later held that "the word 'claim' is sufficiently comprehensive to embrace actions sounding in tort, as those founded upon contract . . ." *Chambre* v *Page*, 289 Mich 278, 285 (1941).

More recently the Court in *CAM Construction* v *Lake Edgewood Condominium Ass'n*, 465 Mich 549; 640 NW2d 256 (2002), relied on the legal definition of the claim as defined by Black's Law Dictionary. Thus, in *CAM Construction*, the Court defined claim as "the aggregate of operative facts *giving rise to a right enforceable by a court* . . ." 465 Mich at 554.

Based on these definitions, the only reasonable interpretation of the word "claim" is that it

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[8]In §5827, the Legislature expressly eliminated the element of damages through the final clause of that statute, "regardless of the time when damage results." The Legislature, however, has not so eliminated the other elements required of an ordinary negligence claim.

means an enforceable cause of action: "[T]he ground "as violation of a right" that entitles a person to bring a suit." Miriam Webster's Dictionary.

Although defendants would have this Court focus entirely on the word "wrong" in §5827, arguing that the limitations period is triggered when the tort is committed, this analysis renders the word "claim" surplusage, which is contrary to basic rules of statutory interpretation. *Koontz*, 466 Mich at 312. Rather, this Court should read the statute as a whole. In doing so, the words themselves reveal that the limitations period is triggered only when both a "claim" and a "wrong upon which the claim is based is done" exists. In other words, §5827 can be read to provide that, assuming a plaintiff has a claim - a legally enforceable cause of action - it accrues when the wrong is done.

The fact that the Legislature expressly eliminated the element of damages in the final clause of §5827 does not change the analysis. Because the Legislature expressed at the time when damage results makes no difference in when the statute begins to run, but failed to express anything with respect to the other elements of the negligence claim - duty, breach and causation - it is reasonable to infer that the Legislature intended that the statute begin to run once duty, breach and causation are discovered, even if damages result at a different time.

Here, the plaintiff did not have a legally enforceable claim at the time when the wrong was done. There is no dispute that the wrong was done in 1986 - when Jeffrey Gorton killed Mrs. Eby. But in light of the absolute absence of knowledge as to who killed Mrs. Eby or the killer's connection to the defendants, Ms. Trentadue did not have sufficient knowledge to state a claim against the defendants when the wrong was done. Rather, both elements that the statute requires - an enforceable claim *and* the wrong upon which the claim was based did not arise until 2002.

Because the plaintiff brought her claims within three years of that time, the Court of Appeals correctly determined that her claims are timely.

III. EVEN IF THIS COURT FINDS THE DISCOVERY RULE TO BE INCONSISTENT WITH MCL 600.5827, THE LIMITATIONS PERIOD THAT APPLIES TO THIS CASE MUST BE BASED ON THE LAW THAT EXISTED AT THE TIME THIS CLAIM ACCRUED.

The defendants argue that the discovery rule should be done away with in its entirety and, on that basis, the Court of Appeals' determination that plaintiff's cause of action was timely filed, should be reversed. For the reasons addressed in the prior section of this brief, the Court should reject the defendants' arguments and affirm the Court of Appeals' decision. However, even if the Court rejects plaintiff's arguments with respect to the continuing viability of the discovery rule, it is clear under Michigan law that such a ruling cannot affect the timeliness of Ms. Trentadue's cause of action. The reason for this lies in a Michigan statute, MCL 600.5869. That statute provides:

> All actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions or right of entry.

The defendants have argued that the discovery rule should be abolished based on what it argues is a literal interpretation of §5827. If this Court is persuaded by the defendants' argument, this Court must apply the same textualist principles to the literal language of MCL 600.5869. In doing so, the Court must conclude that, even if this Court abrogates the discovery rule, that ruling cannot result in the dismissal of plaintiff's cause of action because this case must, for statute of limitations purposes, be governed by "the law under which the right accrued."

The defendants assert in its brief that Ms. Trentadue's cause of action accrued in 1986 when Dr. Eby was murdered. Assuming that the defendants are correct in that assessment, the question of whether Ms. Trentadue's cause of action is barred by the statute of limitations must be decided

"according to the law" in existence as of 1986.

This fact is of utmost significance in this case because, for purposes of MCL 600.5869, there can be no doubt that the limitations law in existence as of 1986 *included a discovery rule.* As of 1986, when the defendants claim that Ms. Trentadue's claim accrued, the law in this state recognized that this cause of action did not accrue until, "all of the elements of the cause of action have occurred and can be alleged in a proper complaint." *Connelly*, 388 Mich at 72. Thus, under the clear wording of MCL 600.5869, the limitations law which applies to this case is not the law which the defendants asks the Court to adopt in this case, but the law that existed as of 1986, including *the law* embedded in the discovery rule which was applicable on that date. As this Court recognized in construing a statutory predecessor to §5869, this statute dictates that, for limitations purposes, "*conditions* existing at the time of the commencement of a legal action will govern." *Richardson* v *Richardson*, 309 Mich 336, 339; 15 NW2d 600 (1944). Here, the *conditions* existing at the time this cause of action accrued included the discovery rule.

Several words used by the Legislature in §5869 deserve particular attention here. That statute specifies that the timeliness of the plaintiff's cause of action *shall* be governed by the law in existence when the claim accrued. This language "indicates a mandatory and imperative directive." *Burton* v *Reed City Hospital Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005); *Oakland County* v *State of Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997).

Second, §5869 specifically refers to *the law* under which the right accrued. Notably, §5869 is not confined to statutory provisions governing a limitations period which were in effect when the cause of action accrued. Thus, §5869 is written broadly to include all *law* bearing on a limitations period. It is well established that, by operation of the Michigan Constitution, the law of this state

includes the common law. *See e.g. People* v *Blume*, 443 Mich 476, 480, n. 7; 505 NW2d 843 (1993) ("the common law is the law of the state"); *Beech Grove Investment Co* v *Civil Rights Commission*, 380 Mich 405, 430; 157 NW2d 213 (1968) ("the common law, by Constitution, is the law of our state"); *Myers v Genesee County Auditor*, 375 Mich 1, 7; 133 NW2d 190 (1965).

Thus, whether the discovery rule is viewed as the product of this Court's interpretation of §5827 or whether the discovery rule is a creature of the common law, *see* fn. 1, *supra*, it makes no difference for purposes of §5869. Even if the defendants were correct and Ms. Trentadue's cause of action accrued in 1986, the fact remains that *the law* of Michigan in existence at that time incorporated the discovery rule. Under the unequivocal language of §5869, it is that law which must be applied to Mr. Trentadue's case.

For this reason as well, the Court of Appeals' decision should be affirmed.

IV. THE DISCOVERY RULE SHOULD BE APPLIED TO THIS CAUSE OF ACTION.

The brief which plaintiff is filing in Case Number 128579 also contains a discussion of the why the discovery rule should be applied to this cause of action. *See* Plaintiff's Brief, pp. 11. Plaintiff incorporates those arguments in this brief.

V. THE COURT OF APPEALS CORRECTLY DETERMINED THAT, UNDER THE DISCOVERY RULE, PLAINTIFF'S CAUSE OF ACTION ACCRUED ONLY WHEN THE CRIME WAS SOLVED AND THE DEFENDANT'S NEGLIGENCE COULD BE IDENTIFIED.

The brief which plaintiff is filing in Case Number 128579 also contains a discussion of the issues raised under this section. *See* Plaintiff's Brief, pp. 12. Plaintiff incorporates those arguments in this brief.

VI. THE COURT OF APPEALS CORRECTLY DETERMINED THAT SUMMARY DISPOSITION WAS NOT APPROPRIATE ON PLAINTIFF'S VICARIOUS LIABILITY CLAIM AGAINST MFO BASED ON THE NEGLIGENCE OF DEFENDANTS NYBERG AND BAKOS.

The brief which plaintiff is filing in Case Number 128579 also contains a discussion of the issues raised under this section. *See* Plaintiff's Brief, pp. 20. Plaintiff incorporates those arguments in this brief.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellee, The Estate of Margarette F. Eby, Deceased, by its Personal Representative, Dayle Trentadue, respectfully requests that this Court affirm the Court of Appeals' March 24, 2005, decision and remand this matter to the Genesee County Circuit Court for further proceedings.

Respectfully submitted,

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Dated: November 15, 2006

CERTIFICATE OF SERVICE

Linda S. Allen, states that on November 15, 2006, she caused to be served, via first class U.S. mail, a copy of Plaintiff-Appellee's Brief on Appeal upon:

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I declare under penalty of perjury, that the above-statements are true to the best of my knowledge, information and belief.

Linda S. Allen
LINDA S. ALLEN